

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corp. Emergency Petition for	)	
Settlements Stop Payment Order	)	
and Request for Immediate Interim Relief	)	IB Docket No. 03-38
	)	
and	)	
	)	
Petition of WorldCom, Inc.	)	
For Prevention of "Whipsawing"	)	
On the U.S.-Philippines Route	)	
	)	
	)	

**ORDER**

**Adopted: March 10, 2003**

**Released: March 10, 2003**

By the Chief International Bureau

**I. INTRODUCTION**

I. In this Order, we find that the recent actions taken by six carriers in the Philippines to disrupt the U.S.-international networks of AT&T Corp. ("AT&T") and WorldCom, Inc. ("WorldCom") on the U.S.-Philippines route, for the purpose of forcing AT&T and WorldCom to agree to higher termination rates, constitute anticompetitive "whipsawing" and a violation of the Commission's International Settlements Policy ("ISP").<sup>1</sup> These actions harm U.S. consumers and competition and

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<sup>1</sup> The Commission has precedent in protecting U.S. consumers and competition from anticompetitive behavior or "whipsawing." The term "whipsawing," as we describe further below in paras. 10-17, has been used to refer to a broad range of anticompetitive behaviors by foreign carriers possessing market power, in which the foreign firms exploit that market power in negotiating settlement rates with competitive U.S. telecommunications carriers. If a U.S. carrier does *not* pay the above-cost settlement rate for terminating its international traffic, it will lose business to a U.S. rival that is willing to pay the higher rate. See, e.g., *In the Matter of AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, Order, 11 FCC Rcd 18,014 (1996) (*Argentina Order*) ("The Commission will not allow foreign monopolists to undermine U.S. law, injure U.S. carriers or disadvantage U.S. consumers."), *In the Matter of Sprint Communications Company, L.P., Request for Modification of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Mexico*, Memorandum, Opinion and Order, 13 FCC Rcd 24,998 (1998) (*Mexico Order*) at 25,000-01, para. 6 ("The Bureau has strictly enforced the Commission's regulations against whipsawing."). See also *Cable & Wireless P.L.C.*, 166 F.3d 1224, 1226 (D.C. Cir. 1999) ("The FCC has long sought to protect U.S. carriers and U.S. consumers from the monopoly power wielded by foreign telephone companies in the international telecommunications market.")

require an expeditious Federal Communications Commission ("FCC" or "Commission") consideration of the petitions of AT&T and WorldCom seeking protection and remedies to address the blockage of circuits and abuse of market power on the U.S.-Philippines route.<sup>5</sup> In response to the Philippine carriers' retaliation against U.S. carriers, we enforce the restrictions of the ISP and direct U.S. carriers to take specific remedial action as provided for under the ISP, while not establishing a specific termination rate for U.S. carriers on the route. We grant the petitions of AT&T and WorldCom and order all U.S. carriers with Commission authorizations permitting the provision of facilities-based international switched voice services on the U.S.-Philippines route to suspend immediately all payments for termination services to the Philippines Long Distance Telephone Company ("PLDT"), the dominant carrier in the Philippines,<sup>6</sup> Smart Communications, Inc. ("Smart") and Subic Telecom, both affiliates of PLDT, Globe Telecom, Inc. ("Globe"), Hayan Telecommunications Company ("BayanTel"), and Digital Telecommunications Philippines, Inc. ("Digitel") (collectively referred to as "Philippine carriers"). The suspension shall remain in effect pending full restoration of AT&T's and WorldCom's circuits and services, and in accordance with the determinations following in this Order.

## 11. BACKGROUND

2. The U.S.-Philippines route, which generated approximately 1.7 billion minutes of traffic in 2001, is the fourth largest U.S.-international route in terms of U.S.-outbound minutes. This volume of traffic places the Philippines route immediately below the U.S.-Mexico, U.S.-Canada, and U.S.-United Kingdom routes and above the U.S.-India route.<sup>7</sup> From 1997 to 2001, the volume of U.S.-billed calls on the U.S.-Philippines route has grown each year by approximately thirty-three percent.<sup>8</sup> According to Commission data, the U.S. billed revenue per minute, i.e., the weighted average of U.S. carrier prices for all calls to the Philippines, fell from \$0.96 per minute in 1997 to \$0.31 per minute in 2001.<sup>9</sup> Although there has been a decline in consumer calling prices and termination rates on the route, the large increase in the number of minutes of traffic on the U.S.-Philippines route means that U.S. carriers, overall, have made larger net payments during the time frame 1997-2001 to Philippine carriers.<sup>10</sup> Commission data shows a \$0.65 decline in calling rates from 1997 to 2001 and a \$0.25 decline in termination rates. The

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*See AT&T Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief*, IB Docket No. 03-38 (filed February 7, 2003) (*AT&T Petition*), *Petition of WorldCom, Inc., for Prevention of "Whipsawing" on the U.S.-Philippines Route*, IB Docket No. 03-38 (filed February 7, 2003) (*WorldCom Petition*).

<sup>1</sup> See The "List of Foreign Telecommunications Carriers that Are Presumed to Possess Market Power in Foreign Telecommunications Markets," is available on the Commission's website at [www.fcc.gov/ih](http://www.fcc.gov/ih).

<sup>4</sup> See FCC, Section 43.61 International Telecommunications Data 2001

See FCC, Section 43.61 International Telecommunications Data 1997, 1998, 1999, 2000, and 2001

<sup>6</sup> See FCC, Section 43.61 International Telecommunications Data 1997 and 2001

Specifically, Commission data shows that, in 1997, U.S. carriers made a net payment for termination services of approximately \$165 million to Philippine carriers and made a payment of \$190 million in 2001

U.S. carriers with the largest shares of U.S.-billed traffic on the U.S.-Philippines route are AT&T, WorldCom, Sprint, and PLDT's U.S. subsidiary.<sup>8</sup> With respect to information about the Philippine market, according to the National Telecommunications Commission, Republic of the Philippines, the Philippine national regulator, five of the six Philippine carriers, excluding Subic Telecom, subject to the petitions collectively possess approximately eighty-five percent of the main telephone lines in the Philippines as of December 31, 2001.<sup>9</sup> The dominant carrier in the Philippines is PLDT."

3 AT&T states that its previously negotiated rates for termination services for U.S.-outbound international traffic to the Philippines have been \$0.08 per minute for termination on fixed networks and \$0.12 per minute for termination on mobile networks." AT&T notes that the rate negotiated for termination of traffic from PLDT into the United States is asymmetric and much lower than \$0.08 per minute." Since this last agreement, the Philippine carriers have all demanded an increased rate of \$0.12 per minute for termination on their fixed networks in the Philippines by February 1, 2003 and, similarly, they have all demanded an increased rate of \$0.16 per minute for termination on mobile networks in the Philippines from all international carriers, including AT&T.<sup>13</sup> Likewise, in its

<sup>8</sup> See FCC, Section 43.61 International Telecommunications Data 2001. Based upon Commission data for 2001, AT&T accounted for approximately 31.2%, WorldCom accounted for 23.2%, Sprint accounted for 22.6%, and PLDT U.S. accounted for 10% of U.S.-billed traffic on the U.S.-Philippines route.

<sup>9</sup> See "Growth in Wireline Telephone Service (1996-2001)," and "Telephone Distribution per Operator (as of December 31, 2001)" available at [www.ntc.gov.ph](http://www.ntc.gov.ph). According to the ITU, main telephone lines are defined as fixed telephone lines connecting a customer's equipment to the Public Switched Network and which have a dedicated port on a telephone exchange. See *International Telecommunication Union, World Telecommunication Development Report* (2002) at A-87. In addition, according to *TeleGeography*, five of the six carriers, excluding Subic Telecom, possess 93.7% of the market share as international carriers in the Philippines. This figure includes one carrier not subject to the petitions, Islacom. See *TeleGeography 2003: Global Traffic Statistics and Commentary*, TeleGeography, Inc. (October 2001) at 26.

<sup>10</sup> See the "List of Foreign Telecommunication, that Are Presumed to Possess Market Power in Foreign Telecommunications Market," is available on the Commission's website at [www.fcc.gov/ib](http://www.fcc.gov/ib). Also, according to an *ex parte* letter filed by PLDT, PLDT possesses approximately 50.6% of the wireline services market and 67% of the land lines in the Philippines. PLDT's mobile affiliate, Smart, possesses 45% of the wireless market in the Philippines. See *Ex Parte* Letter from PLDT to Jackie Ruff, International Bureau (filed March 3, 2003). PLDT also has a 45% ownership interest in the Philippine carrier Piltel that provides both wireline and wireless services, but PLDT maintains that it does not control Piltel.

<sup>11</sup> *AT&T Petition* at 3

<sup>12</sup> *AT&T Petition* at 3. Pursuant to the flexibility offered carriers under the Commission's ISR policy, explained further below, U.S. carriers may choose to agree to asymmetric rates for U.S.-outbound and U.S.-inbound traffic on a U.S.-international route. Carriers take into consideration factors such as the volume of traffic outbound versus inbound to determine the commercial value of such arrangements.

<sup>13</sup> *AT&T Petition* at 4. See Globe Telecom, Inc., SEC Form 6-K filing (January 29, 2003) at 18

petition. WorldCom states that PLDT and other Philippine carriers demanded the same rate increases.<sup>14</sup> According to AT&T and WorldCom, the Philippine carriers provided no cost justification for the demanded rate increases." On January 30, 2003, AT&T received a letter from PLDT stating that it would discontinue receiving AT&T's traffic if AT&T did not agree to the rate increase.<sup>15</sup> WorldCom received similar letters beginning January 9, 2003.

4. In an effort to prevent inetwork disruptions, the International Bureau ("Bureau") sent a written request on January 30, 2003 to the head of the Philippines National Telecommunications Commission, seeking the regulator's assistance in resolving the matter and notifying the regulator of the Commission's intent to protect U.S. consumers and competition from abuses of market power by foreign carriers in the event of retaliation.<sup>17</sup> Concurrently, the U.S. Department of State contacted the government of the Philippines, seeking to ensure that telecommunications circuits would not be disrupted on the U.S.-Philippines route. On January 31, 2003, the National Telecommunications Commission, issued a Memorandum Order to authorized carriers in the Philippines mandating that they not disrupt circuits or service with U.S. carriers in order to promote public service and the national welfare in the Philippines.<sup>18</sup> On February 7, 2003, the National Telecommunications Commission issued an additional Memorandum Order to Philippine carriers in which it issued "a warning that the Commission shall exact observance of your responsibilities as a public service provider, to include that of keeping open your communication circuits to promote PUBLIC SERVICE AND NATIONAL WELFARE and maintain [a] level playing field in the conduct of your operations" (*emphasis in the original*)."

5. On February 1, 2003, both PLDT and Globe began blocking their circuits with AT&T. Shortly thereafter, BayanTel, Digitel, Smart, and Subic Telecom also began blocking a substantial number of their circuits with AT&T.<sup>20</sup> Despite WorldCom's efforts to negotiate an offer of a counter-proposal, PLDT began blocking WorldCom's circuits on February 1, 2003 in retaliation for WorldCom's

<sup>14</sup> See *WorldCom Petition* at 2 and Attachments 1-3.

<sup>15</sup> See *AT&T Petition* at 3-4; *WorldCom Petition* at 3.

<sup>16</sup> See Attachment A to Declaration of Mark Miller, *AT&T Petition*.

<sup>17</sup> Letter from Donald Abelson, Chief, International Bureau, to the Honorable Ann Jane Borje, Commissioner, National Telecommunications Commission (January 30, 2003). On February 11, 2003, the Chief of the International Bureau, FCC, informed Commissioner Borje of the filing of "whipsaw" petitions at the Commission.

<sup>18</sup> See Memorandum Order, Republic of the Philippines, Department of Transportation and Communications, National Telecommunications Commission (January 31, 2003).

<sup>19</sup> See Memorandum Order, Republic of the Philippines, Department of Transportation and Communications, National Telecommunication Commissions (February 7, 2003); PLDT Comments, Attachment 12 at 2.

<sup>20</sup> *AT&T Petition* at 5.

refusal to agree to the demanded rate increase.<sup>21</sup> Although WorldCom had received similar demands for rate increases from nine carriers with which it corresponds in the Philippines, only PLDT, Smart, and Globe discontinued or degraded service with WorldCom.<sup>22</sup> On February 28, 2003, WorldCom informed the Commission that it had reached an "interim agreement" with PLDT and Smart in order to return to negotiations and restore circuits. WorldCom has also indicated that Globe has restored circuits pending further negotiations between the carriers for a similar interim agreement." WorldCom has maintained its petition at the Commission and "continues to support a strong Commission response to prevent whipsawing" so long as U.S. carrier circuits are blocked or degraded."

6. AT&T is currently attempting to refile its U.S.-Philippine traffic through alternative routes; however, AT&T states that call quality and completion are suffering.<sup>25</sup> Refile or re-origination involves sending traffic on a U.S.-international route through a third foreign point to the ultimate destination, taking advantage of the third foreign point's termination agreement with the ultimate destination foreign point.

7. AT&T and WorldCom filed petitions on February 7, 2003 requesting that the Commission take action to protect U.S.-international carriers from "whipsawing" behavior occurring on the U.S.-Philippines route. Specifically, AT&T requests immediate enforcement of the prohibition on "whipsawing" under the Commission's International Settlements Policy to prevent six foreign carriers in the Philippines (PLDT, Globe, BayanTel, Digitel, Smart, and Subic Telecom) from continuing to block AT&T's U.S.-Philippines traffic in order to force AT&T to agree to a unilateral increase in existing rates for termination services in the Philippines.

8. Both AT&T and WorldCom have reported in their petitions to the Commission that Philippine carriers blocked their U.S.-outbound circuits to the Philippines; although, WorldCom's circuits have since been restored pending further negotiations with the Philippine carriers.<sup>26</sup> AT&T petitions the Commission to issue an order directing all U.S. carriers to stop all payments to the

<sup>21</sup> *WorldCom Petition* at 3.

<sup>22</sup> *WorldCom Petition* at 1-2. *Ex Parte* letter from Scott Shefferman, Associate Counsel, WorldCom to Marlene Dortch, Secretary, FCC (filed February 21, 2003).

<sup>23</sup> *See Ex parte* Letter from Scott Shefferman, Associate Counsel, WorldCom, to Marlene Dortch, Secretary, FCC (filed March 5, 2003).

<sup>24</sup> *See Ex parte* Letter from Scott Shefferman, Associate Counsel, WorldCom, to Marlene Dortch, Secretary, FCC (filed March 4, 2003).

<sup>25</sup> *AT&T Petition* at 5-6. AT&T states that its answer seizure ratio ("ASR") that measures call completion has dropped from about 35-40% to under 5% since early February 2003. *AT&T Reply* at 3.

<sup>26</sup> *See AT&T Petition, WorldCom Petition.*

Philippine carriers for termination services pending full restoration of its circuits. WorldCom similarly requests that the Commission immediately order all U.S. carriers to suspend payments to PLDT, until PLDT has fully restored all U.S. carrier circuits and is accepting all facilities-based traffic from other U.S. carriers terminating on PLDT's network in the Philippines.

9. On February 10, 2003, the Bureau placed the AT&T and WorldCom petitions on public notice, providing an opportunity for those interested in the matter to submit to the Commission any information that they considered useful.<sup>27</sup> On February 21, 2003, the Bureau received one comment and three oppositions to the petitions.<sup>28</sup> The oppositions from two of the Philippine carriers, PLDT and Globe, argue, among other things, that AT&T and WorldCom are not victims of "whipsawing."<sup>29</sup> In addition, PLDT generally argues that: (1) the proposed rates at issue are still below the Commission's relevant benchmark settlement rate of \$0.19 per minute for the U.S.-Philippines route and are "presumptively just and reasonable" under the Commission's policies; (2) the Philippine market is competitive as demonstrated by the Commission's approval of International Simple Resale ("ISR") on the U.S.-Philippines route; (3) PLDT has not offered its U.S. affiliate any "special concessions;" (4) the Commission should defer to the Philippine national regulator's February 7, 2003 Memorandum Order that PLDT interprets to condone its actions; and (5) the petitioners will not suffer irreparable harm; therefore, their request for interim relief should be denied. Globe also argues that the events occurring on the U.S.-Philippines route are justified by AT&T's nonpayment for termination services due on February 4, 2003 and that Globe must block off-net traffic to PLDT out of necessity to prevent losses it will bear.<sup>30</sup> Digitel further argues that AT&T has engaged in business practices that amount to the

<sup>27</sup> Public Notice, DA 03-390 (February 10, 2003). This Notice was not required under the rules. *See In the Matter of AT&T Corp., MCI Telecommunications Corp., Sprint, LDDS WorldCom, Petition for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Peru*. Order on Review, 14 FCC Rcd 8318 (1999) (*Peru Order*) at 8328-29, paras. 24-26 (In rejecting the challenge from the foreign carrier in Peru that the Bureau did not request public comment on modification requests that the Bureau found to demonstrate "whipsawing" on the part of the foreign carrier, the Commission specifically concluded that the Bureau's enforcement of its existing ISP against U.S. carriers represented "an act of domestic regulation," although undoubtedly there would be an indirect effect on the foreign carrier. Therefore, the Commission found that the Bureau "had no obligation to serve the modification requests on any foreign carrier or to seek comment from them . . . [and the Commission satisfied] whatever process rights a foreign correspondent . . . may have by providing notice of the ISP [and any amendments the Commission makes in its rulemakings]."). The Bureau subsequently extended the initial comment deadline in Public Notice. DA 03-468 (February 20, 2003).

<sup>28</sup> *See Comments of Digicel Limited*, IB Docket 03-38 (filed February 21, 2003) (*Digicel Comments*). *See Opposition of Globe Telecom*, IB Docket No. 03-38 (filed February 21, 2003) (*Globe Opposition*); *Philippine Long Distance Telephone Company's Consolidated Opposition to AT&T and WorldCom Petitions*, IB Docket No. 03-38 (filed February 21, 2003) (*PLDT Opposition*); *Comments of Digital Telecommunications Phils., Inc.*, IB Docket 03-28 (filed February 21, 2003) (*Digitel Comments*).

<sup>29</sup> *See PLDT Opposition*.

<sup>30</sup> *See Globe Opposition*. Moreover, both PLDT and Globe argue that there is no evidence of collusive behavior, and the agreements made among Philippine carriers for the proposed rates reflect "merely the instrument by which competitive carriers operating in different segments of the market (international, local exchange and mobile respectively) agree to terminate their traffic to their various networks". *See PLDT Opposition* at 6, note 13; *Globe*

reverse "whipsawing" of Philippine carriers.<sup>31</sup> In addition, Digitel states that it, and the other Philippine carriers are suffering from the worldwide downturn in the telecommunications market and the devaluation of the Philippine currency, the peso, against the U.S. dollar." On February 27, 2003, the Commission received six replies from U.S. and Philippine carriers.<sup>33</sup>

## 11. DISCUSSION

### A. Finding of "Whipsawing"

10. We find, as further discussed below, that AT&T and WorldCom present cases of "whipsawing" and a violation of the Commission's ISP. The Commission's ISP is the framework within which U.S. carriers negotiate with foreign carriers for the provision of U.S.-international services.<sup>34</sup> The

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*Opposition at 5*

<sup>31</sup> Specifically, Digitel argues that AT&T requested a lower settlement rate from Digitel and when Digitel did not agree to lower its rate, AT&T diverted its international traffic to other carriers in the Philippines multiple times. Moreover, Digitel argues that it is not "blocking" circuits of AT&T, but it simply sent AT&T a notice that it would terminate service; with AT&T six months from the receipt of the notice. *See Digitel Comments*. However, AT&T states that its service with Digitel has been degraded and its traffic completion rates are still below pre-February 1, 2003 levels. *See AT&T Reply at 2*.

<sup>32</sup> *See, e.g., Digitel Comments at 8*. PLDT states that its foreign debt costs have almost tripled because of the devaluation of the Philippine peso from an exchange of 20 pesos to the U.S. dollar to 54 pesos to the U.S. dollar. *Ex parte Letter from PLDT* (filed February 27, 2003).

<sup>33</sup> *See Reply Comments of ABS-CBN Telecom North America, Inc.* (filed February 27, 2003) (*ABS-CBN Reply*); *AT&T Reply to Oppositions to Emergency Petition for Settlements Stop Payment Order and Request for Immediate Interim Relief* (filed February 27, 2003) (*AT&T Reply*); *Position Paper of Bayan Telecommunications Inc.* (filed February 26, 2003) (*BayanTel Reply*); *Globe Telecom, Inc. Reply Comments* (filed February 21, 2003) (*Globe Reply*); *Reply Comments of Verizon* (filed February 27, 2003) (*Verizon Reply*); *Reply of WorldCom* (filed February 27, 2001) (*WorldCom Reply*).

<sup>34</sup> The Commission's ISP dates back, as the Uniform Settlements Policy, to the 1930's. *See, e.g., Mackay Radio and Telegraph Co.*, 2 FCC 592 (Telegraph Committee 1936), *aff'd sub nom Mackay Radio v. FCC*, 91 F.2d 641 (D.C. Cir. 1938). The Commission formalized the ISP into its rules in the 1980's. *See Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes*, Report and Order, CC Docket No. 85-204, 51 Fed. Reg. 4736 (Feb. 7, 1986); *modified in part on recon.*, Order on Reconsideration, 2 FCC Rcd 1115 (1987); Further Reconsideration, 3 FCC Rcd 1614 (1988). *See* 47 C.F.R. §§ 43.51(e), 63.14, 64.1001. The ISP contains three requirements along with a general rule and applicable filing requirements meant to deter anticompetitive harm against U.S. carriers. The three elements of the ISP that serve as conditions on U.S. carriers entering into agreements with foreign carriers are: (1) all U.S. carriers must be offered the same effective accounting rate with the same effective date for the rate ("nondiscrimination"); (2) U.S. carriers are entitled to a proportionate share of U.S.-inbound, or return, traffic based upon their proportion of U.S.-outbound traffic ("proportionate return"); and (3) the accounting rate is divided evenly 50-50 between U.S. and foreign carriers for U.S. inbound and outbound traffic ("symmetrical settlement rates"). *See* 47 C.F.R. § 43.51(e). In addition, the Commission requires U.S. carriers to comply with "No Special Concessions" rule, prohibiting U.S. carriers from agreeing to exclusive arrangements with dominant foreign carriers, in Section 63.14(a)-(b) on routes governed by the ISP. *See* 47 C.F.R. §

ISP prohibits “whipsawing” against U.S. carriers. As the Commission has previously stated, the ISP (or its predecessor policy the “uniform settlements policy”) has evolved through Commission decisions, policy statements, and practice and has the objective of ensuring that “U.S. entities are treated fairly and that American consumers receive the benefits that result from the provision of international services on a competitive basis.”<sup>35</sup> The practice of “whipsawing” has arisen because the U.S. telecommunications industry has become much more competitive in the past twenty years, while the industry remains substantially less competitive in much of the rest of the world.<sup>36</sup> Although “whipsawing” is not limited to a specific form of market power abuse,<sup>37</sup> foreign carriers with market power, or a group of carriers acting in concert, may exploit this competitive differential while negotiating settlement rates.<sup>38</sup> U.S. carriers that resist making such “whipsaw” concessions to foreign carriers usually face threats of retaliation, some overt, such as the blocking of circuits, and others more subtle, such as refusals to negotiate.” The Commission has found that “whipsawing” is contrary to the public interest, as it forces U.S. carriers to recover unnecessarily high payments imposed by foreign carriers from U.S. ratepayers

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63 14(a)-(b). In addition, on routes governed by the ISP, U.S. carriers must publicly file their rates and agreements in order to ensure compliance with the requirements of the ISP. See 47 C.F.R. §§ 43.51, 64.1001. For further history on the ISP and the development of the Commission’s policies, see *In the Matter of International Settlements Policy Reform, International Settlements Rates*, IB Docket Nos. 96-261, 02-324, Notice of Proposed Rulemaking, 17 FCC Rcd 19,954 (2002) (*NPRM*). Even when ISR is permitted on a route, the ISP’s general prohibition against “whipsawing,” and other anticompetitive harm such as “one-way bypass,” and the requirements of “No Special Concession” rule continue to apply. See *ISP Reform Order*, 14 FCC Rcd 1963 at 79086-87, para. 62.

<sup>35</sup> See *In the Matter of Implementation and Scope of the International Settlements Policy for Parallel International Communications Routes*, CC Docket No. 85-204, Order on Reconsideration, 2 FCC Rcd 1118, para. 2.

<sup>36</sup> *Cable & Wireless P.L.C.*, 166 F.3d 1224, 1227 (D.C. Cir. 1999); and see e.g., *In the Matter of Atlantic Tele-Network, Inc. Application for Authority to Acquire and Operate Facilities for Direct Service Between the U.S. and Guyana*, Order on Review, 8 FCC Rcd 4776 (1993) (*Guyana Order*); *Argentina Order*, 11 FCC Rcd 18,014, Order on Review, 14 FCC Rcd 8306 (1999); *In the Matter of MCI Communications Corporation, Petition for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with India*, Memorandum, Opinion and Order, DA 98-1060 (rel. June 4, 1998) (*India Order*).

<sup>37</sup> “Whipsawing” often manifests itself in the form of a foreign carrier “picking off” or isolating a U.S. carrier and placing that carrier under substantial pressure to agree to its unduly favorable demands. Once one U.S. carrier has conceded, other U.S. carriers are pressured to accept the same agreement or risk sanctions or retaliation. The ISP attempts to create a uniform bargaining position to counter this “divide-and-conquer approach.” See *India Order*, DA 98-1060 (finding that MCI’s proposed rates on the U.S.-India route demonstrated an abuse of monopoly power and “whipsawing” by the dominant foreign carrier in India, as the current proposed rates were higher than rates offered in a prior proposal from the foreign carrier) at para. 3; *Mexico Order*, 13 FCC Rcd 24,998 at 25,002, para. 9.

<sup>38</sup> See *NPRM*, 17 FCC Rcd 19,954 at 19,956-57, para. 2; *ISP Reform Order*, 14 FCC Rcd 7963 at 7973, para. 30 (noting the possibility of anticompetitive behavior resulting from several foreign carriers acting collectively in a foreign market).

<sup>39</sup> See *Mexico Order*, 13 FCC Rcd 24,998 at 25,002, note 21.



through higher calling prices.<sup>40</sup> The ISP balances this asymmetry in bargaining power that occurs when competitive U.S. carriers attempt to negotiate with a foreign carrier or carriers possessing market power in the foreign market.<sup>41</sup>

11. We find that "whipsawing" has occurred on the U.S.-Philippines route. PLDT is the dominant local exchange carrier in the Philippines. It provides local service, including the termination of U.S.-Philippine calls that originated in the United States, and it possesses sixty-seven percent of the landlines in the Philippines and controls approximately forty-five percent of the wireless market in the Philippines.<sup>42</sup> PLDT continues to be classified under Commission rules as the dominant carrier on the U.S.-Philippines route.<sup>43</sup> PLDT has market power in the market for local telecommunications service in the Philippines. According to the Petitioners, PLDT did not attempt to demonstrate that its demand for an increase in U.S.-international termination rates from AT&T of approximately fifty percent represents an increase in the cost of termination, and there is no evidence in the record of this proceeding that it is cost-justified.<sup>44</sup> When AT&T and WorldCom did not agree to the price increase, PLDT threatened to block their traffic. As the Commission has noted previously, "whipsawing" tends to exist during the negotiation stages prior to the filing of service agreements or rate modifications with the Commission.<sup>45</sup> On February 1, 2003, PLDT followed through on its threat and commenced blocking AT&T's and WorldCom's circuits.<sup>46</sup> PLDT's actions are designed to force the rate increase on U.S. carriers. Thus,

<sup>40</sup> See *supra* note 1.

<sup>41</sup> See *Implementation and Scope of the Uniform Settlements Policy for Parallel International Communications Routes*, Report and Order, CC Docket No. 85-204, 51 Fed. Reg. 4136 (Feb. 7, 1986) at para. 2. Because the intent of ISP is to create a united bargaining position among U.S. carriers in order to prevent anticompetitive harm, we dismiss Globe's arguments that we are unfairly positioning U.S. carriers in their rate negotiations or the arguments that we are permitting "reverse whipsawing." See *Globe Opposition* at 17-19; *Globe Reply* at 5-8; *Verizon Reply* at 6-8.

<sup>42</sup> PLDT possesses approximately 50.6% of the wireline services market and 67% of the land lines in the Philippines. PLDT's mobile affiliate, Smart, possesses 45% of the wireless market in the Philippines. See *Ex Parte* Letter from PLDT to Jackie Ruff, International Bureau (filed March 3, 2003).

<sup>43</sup> See The "List of Foreign Telecommunications Carriers that Are Presumed to Possess Market Power in Foreign Telecommunications Markets," is available on the Commission's website at [www.fcc.gov/ib](http://www.fcc.gov/ib). See 41 C.F.R. §§ 43.51 note 3, 63.09(f).

<sup>44</sup> See *AT&T Petition* at 3-4. Declaration of Mark Miller at 3-4; *WorldCom Petition* at 2. AT&T further notes that the prior \$0.08 rate it had negotiated with Philippine carriers is still much higher than rates AT&T pays for termination services for U.S.-billed traffic in the same region with carriers in Australia, Malaysia, New Zealand and Singapore that are under \$0.03 per minute, and the rates AT&T pays to carriers in Hong Kong, Japan, South Korea and Taiwan that under \$0.04 per minute. *AT&T Reply* at 13-14.

See discussion, *Cable & Wireless I L C*, 166 F.3d 1224, 1227 (D.C. Cir. 1999).

<sup>46</sup> *AT&T Petition* at 7; *WorldCom Petition* at 3. As noted *supra* para. 5, WorldCom has reached an interim agreement with PLDT, and PLDT has ceased blocking WorldCom circuits.

11 D1's actions amount to "whipsawing" of AT&T and WorldCom, in violation of the Commission's ISP.<sup>47</sup>

12. The record also suggests that the five other Philippine carriers named in the *AT&T Petition* have engaged in concerted action, along with PLDT, to "whipsaw" U.S. carriers into the same rate increase.<sup>48</sup> Each of these carriers demanded identical increased rates for terminating international calls destined for the Philippines to be effective on the same day, February 1, 2003, as PLDT demanded.<sup>49</sup> In addition, the record shows that at least three of these five carriers entered into interconnection agreements pursuant to which they all agreed to increase their termination rates on international calls.<sup>50</sup> On or shortly after February 1, 2003, all six Philippine carriers, including PLDT, began blocking all or a substantial part of their circuits with AT&T or WorldCom. We dismiss Globe's contention that it has not engaged in "whipsawing" because it is only blocking its direct traffic from AT&T that ultimately goes off of Globe's network to PLDT's network in order to avoid domestic payments among the Philippine carriers as part of their agreement to raise international termination rates.<sup>51</sup> As noted above, PLDT is the dominant carrier in the Philippines; therefore, it is likely that a majority of traffic coming into the Philippines will ultimately be destined for PLDT's network. The fact that Globe is only partially blocking circuits with a U.S. carrier does not erase the fact that Globe is retaliating against AT&T for refusing to accede to a rate increase and is engaged in "whipsawing."<sup>52</sup>

13. The Commission has aggressively enforced the ISP to prevent harm to the public interest, such as unilateral rate increases that ultimately harm U.S. consumers, and it has worked to

<sup>47</sup> PLDT attempts to justify its rate increase by complaining that its rates have dropped by two-thirds in the last four years, which "den[ies] it important revenues needed to improve telecommunications infrastructure in the Philippines." It states that this has occurred because AT&T and WorldCom have misused their market share and "bypassed" PLDT's facilities as a means of "pressuring" PLDT to lower its termination rates. Given the number of U.S. carriers that compete in providing service on the U.S.-Philippines route and their respective shares of U.S.-hilled traffic on the route, PLDT's allegations that AT&T and WorldCom possess individual market power lacks credibility. Moreover, to the extent that the actions of the U.S. carriers drove settlement rates down, this reflects nothing more than market forces at work. It would be flatly contrary to the ISP, and it would be detrimental to consumer welfare in the Philippines and in the U.S., to permit PLDT to force up settlement rates by "whipsawing" U.S. carriers, either alone or by acting in concert with other Philippine carriers. The fact that the increased rates demanded by PLDT and the other carriers do not overshoot the benchmark does not change the fact that the rate increase results from the exercise of market power through "whipsawing."

<sup>48</sup> These carriers are BayanTel, Digitel, Globe, Smart, and Subic Telecom.

<sup>49</sup> *AT&T Petition* at 4; *WorldCom Petition* at 1-2.

<sup>50</sup> See Globe Telecom, Inc., SEC Form 6-K filing, (January 29, 2003) at IS.

<sup>51</sup> We note that it appears from the agreement contained in Globe's SEC filing that the termination rate for metered calls terminating on local wireline networks in the Philippines is an approximate \$0.046. See Globe Telecom, Inc., SEC Form 6-K filing, (January 29, 2003) at 18.

<sup>52</sup> See *Globe Opposition* at 3-5.

achieve more cost-based termination rates through its accounting rate policies, such as International Simple Resale.<sup>53</sup> If certain settlement rate criteria are met on a U.S.-international route where the foreign end is a WTO Member, the Commission will permit U.S. carriers to engage in more flexible ISR arrangements. The Commission has previously approved the U.S.-Philippines route for the provision of ISR. The Commission's ISR policy, along with other accounting rate policies such as our benchmarks policy, are intended to promote more cost-based accounting rates.<sup>54</sup> The Commission has determined that inflated accounting rates are contrary to the public interest and lead to higher consumer calling prices, deter service innovations, and negatively affect the development of competition in global markets.<sup>55</sup> ISR, or the provision of switched services over resold or facilities-based private lines that connect to the public switched network at either end-point, permits U.S. carriers with the appropriate Section 214 authorization to engage in more commercially-oriented agreements that do not strictly adhere to the restrictions of the ISP on routes where the risks of competitive harm from such deviation are deemed low by demonstration of more cost-based settlement rates or equivalent opportunities in the foreign market to provide private line service.<sup>56</sup> As a result, ISR rates generally are below the applicable benchmark rates for U.S.-international routes.<sup>57</sup> Nevertheless, the Commission has always retained the ISP, and its safeguard against "whipsawing," along with the "No Special Concessions" rule, on routes approved for the provision of ISR.<sup>58</sup> As the approval of ISR for a U.S.-international route is meant to

<sup>53</sup> See *supra* note 37.

<sup>54</sup> See *NPRM*, 17 FCC Rcd 19,954 at 19,960-64, paras. 7-13. An accounting rate is the price a U.S. facilities-based carrier negotiates with a foreign carrier for handling one minute of international telephone service. Each carrier's portion of the accounting rate is referred to as the "settlement rate" that represents a terminating access charge. We note that multilateral organizations, such as the International Telecommunication Union, have also encouraged the promotion of more cost-based rates. See *ITU-T Recommendation D 140*.

<sup>55</sup> For background on Commission decisions, see generally, *NPRM*, 17 FCC Rcd 19,954.

<sup>56</sup> The Commission approves U.S.-international routes for the provision of ISR where either at least 50% of the U.S.-billed traffic on WTO Member routes is being settled at or below the relevant benchmark rate, or the route passes an "equivalency" analysis. If the foreign point is a non-WTO Member, both criteria are required. The "equivalency" analysis requires, among other things, that the foreign carrier in the destination point provide U.S. carriers with reasonable and nondiscriminatory charges and terms and that competitive safeguards are in place to protect against anticompetitive or discriminatory practices. If a U.S. carrier possesses a Section 214 authorization to provide ISR globally, it may do so only on Commission-approved routes. Currently, more than 70 of the approximate 203 U.S.-international routes are approved for ISR. See 47 C.F.R. §§ 63.16, 63.18.

<sup>57</sup> The Commission has stated that for 2001, 60% of the total settled U.S.-international minutes of traffic were settled below the benchmark rates. See *NPRM*, 17 FCC Rcd 19,954 at 19,973, para. 33. The Commission's benchmarks policy, in order to move accounting rates toward costs, set specific rates with transition deadlines over which U.S. carriers may not pay foreign carriers for termination services. *In the Matter of International Settlement Rates*, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19,806 (1997) (*Benchmarks Order*); Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd 9256 (1999), *aff'd sub nom Cable & Wireless P.L.C. v. FCC*, 166 F.3d 1224 (D.C. Cir. 1999). As part of the Commission's continuing efforts to move settlement rates toward more cost-based levels, the Commission recently set forth for comment in the *NPRM* whether the Commission should re-examine and revise its accounting rate policies.

<sup>58</sup> The ISP remains on routes approved for ISR primarily to address anticompetitive concerns that may arise

provide a mechanism to achieve the goal of more cost-based termination rates, it is not intended to be a Commission finding that competition exists in the foreign market.<sup>59</sup> Therefore, although the agreements on the U.S.-Philippines route are not traditional accounting rate agreements, the ISP continues to apply to the route to address potential backsliding such as the exercise of market power to increase rates unilaterally. Accordingly, we reject Globe's argument that ISR rates are not governed by the ISP.<sup>60</sup>

14. Similarly, we reject PLDT's assertion that the ISP does not currently apply to the U.S.-Philippines route because the rates proposed may meet the even more restrictive settlement rate criteria to remove the ISP entirely for the U.S.-Philippines route.<sup>61</sup> The removal of the ISP from routes with dominant foreign carriers is not automatic.<sup>62</sup> While a showing must be made with respect to the level of the settlement rate on a route in order to remove the ISP, the Commission must still make an affirmative finding that removal of the ISP is in the public interest.<sup>63</sup> Thus, the fact that the Commission has not

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such as "one-way bypass" that may occur if foreign carriers close their markets to the provision of **ISR** but take advantage of the permissibility of private line resale into the United States. Even when ISR is permitted on a route, the ISP's general prohibition against "whipsawing" and the requirements of the "No Special Concession" rule apply. *See In the Matter of 1998 Biennial Regulatory Review -- Reform of the International Settlements Policy and Associated Filing Requirements*, IB Docket Nos. 98-148 and 95-22, CC Docket No. 90-337 (Phase II), Report and Order and Order on Reconsideration, 14 FCC Rcd 7963 (1999) (*ISP Reform Order*) at 7971, para. 22, 47 C.F.R. § 43.51. In addition, the Commission has set forth a different, more rigorous standard for removing the ISP from U.S.-international routes. *See* 47 C.F.R. § 43.51(e)(3) and accompanying note. Even on routes where the Commission removes the ISP, a modified form of the "No Special Concessions" rule applies. *See* 47 C.F.R. § 63.14 (c).

<sup>59</sup> Although the compliance with the settlement rate criteria for ISR approval may be an indication that there are competitive pressures on a U.S.-international route from competing carriers on the foreign end, the availability of least-cost routing methods such as netle and re-origination, or bypass mechanisms such as IP telephony, the Commission has retained the ISP on ISR-approved routes to address possible anticompetitive behavior or backsliding that may still occur.

<sup>60</sup> *Globe Opposition* at 18.

<sup>61</sup> *PLDT Opposition* at 5-6. In summary, as described hereiii, the logical progression of the Commission's ISP and ISR policies is the following: Absent any Commission action, the ISP applies to a route. Upon approval by the Commission, based on a public interest finding that includes the fact that at least 50% of U.S.-billed traffic on a U.S.-WTO route is settled at or below benchmarks, a route becomes eligible ~~for~~ ISR arrangements, but the ISP continues to apply. *See* 47 C.F.R. § 63.16. To have the ISP removed from a route, a U.S. carrier must demonstrate that at least 50% of the traffic on a route with a foreign carrier possessing market power, regardless of whether the carrier is from a WTO Member, is at least 25% below the relevant benchmark rate. *See* 47 C.F.R. § 43.51; *ISP Reform Order*, 14 FCC Rcd 7963

<sup>62</sup> The Commission retains its discretion whether to remove or to re-impose the ISP on a route in order to consider if there is evidence of anticompetitive behavior or other harm to the public interest. *See ISP Reform Order*, 14 FCC Rcd 7063 at 7973, para. 30.

<sup>63</sup> The Commission found that competitive pressure that constrains anticompetitive behavior may be occurring in markets with dominant foreign carriers if the settlement rate on a route is at least 25% below the relevant benchmark. *ISP Reform Order*, 14 FCC Rcd 7963 at 7982, para. 52. Carriers must petition the Commission to have the ISP removed from a route with a dominant carrier and receive affirmative approval. The Commission keeps a

issued a declaratory ruling to remove the ISP from the U.S.-Philippines route is not "irrelevant," as PLDT states.<sup>64</sup> Moreover, even on routes where the Commission has removed the ISP, the Commission has reserved the right to take remedial action if necessary where "a foreign carrier that otherwise would appear to lack market power might possess some ability unilaterally to set rates for terminating U.S. traffic due to government policies or collusive behavior in the foreign market." "

15. In the petitions before the Commission, the Bureau finds that AT&T and WorldCom have demonstrated "whipsawing" by the Philippine carriers.<sup>66</sup> AT&T and WorldCom have suffered substantial pressure, including selective retaliation to their networks, to accept the unilateral rate increases demanded by the dominant carrier in the Philippines, PLDT, and the other Philippine carriers that have likewise engaged in retaliation.<sup>67</sup> U.S. carriers have not presented the Commission with a justifiable basis for these demanded rate increases, and have suffered the intentional loss of their circuits in the course of their negotiations with Philippine carriers." As AT&T notes, AT&T does have underlying operating agreements with PLDT and Globe; therefore, it appears that there are legal contracts requiring continued provision of service pending negotiation of new rate annexes.<sup>69</sup> Furthermore, the argument made that International comity compels us to permit "whipsawing" of U.S.-

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list of router from which it has lifted the ISP on the Commission's website at [www.fcc.gov/ib](http://www.fcc.gov/ib). To date, the Commission has removed the ISP from only 15 routes. See 41 C.F.R. § 43.51

<sup>64</sup> *PLDT Opposition* at 6, note 14

<sup>65</sup> *ISP Reform Order*, 14 FCC Rcd 7963 at 7973, para. 30.

<sup>66</sup> See *India Order*, DA 98-1060 (finding that MCI's proposed rates on the U.S.-India route demonstrated an abuse of monopoly power and "whipsawing" by the dominant foreign carrier in India, as the current proposed rates were higher than rates offered in a prior proposal from the foreign carrier); *Argentina Order*, 11 FCC Rcd 18,014 at 18,014, para. 2 ("This unprecedented discriminatory and retaliatory behavior constitutes classic whipsawing and violates our International Settlements Policy")

<sup>67</sup> See *supra* note 37

<sup>68</sup> We do not measure PLDT's compliance with the Philippine regulator's February 7, 2003 Memorandum Order; however, it reasonably appears that the express language of the order refutes PLDT's contention that because of the acknowledgment about ongoing negotiations, there was not also a continuing mandate on public service providers to maintain circuits open. See *supra* para. 4; *PLDT Opposition* at 10-12. We note that on February 26, 2003, the Philippine regulator contacted the FCC and indicated that termination of service is anticipated if there is no agreement for service. See *Ex Parte* Email from Patricia Paoletta, counsel for Globe, to the International Bureau, FCC (February 26, 2003) containing Letter from the *Republic of the Philippines, National Telecommunications Commission* to the Commissioners, FCC (February 26, 2003)

<sup>69</sup> U.S. carriers typically negotiate rate agreements that act as rider contracts upon the underlying operating or service agreement. Despite the fact that a rate agreement in a separate annex expires, the underlying operating agreement remains during the negotiation. *AT&T Reply* at 6-7. PLDT argues that the lack of an effective termination rate agreement with AT&T and WorldCom permitted it, under the Philippine regulator's February 7, 2003 Memorandum Order, to discontinue services. See *PLDT Opposition* at 11

international carriers is unfounded.<sup>70</sup> There is no conflict of foreign legal or regulatory prohibitions in our enforcement of the ISP. Moreover, the fact that the Bureau enforcement of Commission policies and regulations may have extraterritorial consequences does not bar our action to protect the public interest.<sup>71</sup>

We note that we are not regulating the rates offered consumers in the Philippine market or conducting cost studies of domestic rates in the Philippines. Such oversight is properly a matter of domestic regulation within the responsibility of the Philippine national regulator. However, the Commission has the authority and responsibility to oversee and regulate rates authorized U.S. carriers agree to pay foreign carriers to the extent those rates affect U.S. competition and consumers, despite the indirect effect on a foreign market.<sup>72</sup> Furthermore, the Bureau has not previously approved settlement rate increases proposed by U.S. carriers on U.S.-international routes. A U.S. carrier must make a strong showing that a proposed rate increase would be in the public interest.<sup>73</sup>

16. Moreover, we reject PLDT's arguments that the proposed rate increases are necessarily in compliance with Section 201 of the Communications Act because they result in rates below the applicable benchmark settlement rate for the U.S.-Philippines route of \$0.19 per minute.<sup>74</sup> The Commission has repeatedly stated that the benchmark rates are "still considerably above cost-based rates," as they were based upon publicly-available foreign retail rate information.<sup>75</sup> The Commission adopted the benchmark rates and other accounting rate policies in an effort to move inflated international settlement rates toward cost-based levels. Thus, the Commission expects that in a fully competitive

<sup>70</sup> See *Globe Reply* at 8-10; *Verizon Reply* at 2.

<sup>71</sup> See *Cable & Wireless, P.L.C.*, 166 F.3d 1224 (D.C. Cir. 1999). We also note that the Commission is currently considering elimination of the callback policies that Globe cites. See *Enforcement of Other Nation's Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-Back Service*, IB Docket No. 02-18, RM-9249, Notice of Proposed Rule Making, 17 FCC Rcd 2794 (2002).

<sup>72</sup> See *Cable & Wireless P.L.C.*, 166 F.3d 1224 (D.C. Cir. 1999).

<sup>73</sup> We note that in the *Benchmarks Order*, with respect to rates exceeding the benchmark rates, the Commission did state that an interested party could petition the Commission to reconsider the applicable benchmark rate with which U.S. carriers must comply if the rate does not permit recovery of total service long run incremental costs incurred to receive, transmit and terminate international service. *Benchmarks Order*, 12 FCC Rcd 19,806 at 19,842-43, para. 74. See also *India Order*, DA 98-1060 (finding that MCI's proposed rates on the U.S.-India route demonstrated an abuse of monopoly power and "whipsawing" by the dominant foreign carrier in India, as the current proposed rates were higher than rates offered in a prior proposal from the foreign carrier).

<sup>74</sup> See *PLDT Opposition* at 4. The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* The Telecommunications Act of 1996, amends the Communications Act of 1934. Hereinafter, all citations to the Communications Act will be to the relevant section of the United States Code unless otherwise noted. The Communications Act of 1934, as amended, will be referred to herein as the "Communications Act" or the "Act." 47 U.S.C. § 201.

<sup>75</sup> *NPRM* 17 FCC Rcd 19,954 at 19,977-78, para. 44; *Benchmarks Order*, 12 FCC Rcd 19,806 at 19,855-56, para. 102.

market, U.S. carriers will negotiate rates below the benchmark rates.<sup>76</sup> The Commission's benchmarks policy in no way supersedes the Commission's continuing policy against anticompetitive "whipsawing," nor does it diminish the Commission's responsibility to protect the public interest from resulting, unjust and unreasonable rates.<sup>77</sup> Therefore, while we respect the proper jurisdiction of the Philippine regulator, we do not agree that the international termination rates Philippine carriers are unilaterally imposing are necessarily "fair and reasonable" simply because they are below the applicable benchmark rate."

17. The letters from PLDT to AT&T and WorldCom indicate that PLDT and the other Philippine carriers have used their control over terminating traffic in the Philippine market to attempt to extract financial concessions from AT&T and WorldCom.<sup>79</sup> The facts show that PLDT and the other Philippine carriers have protected other U.S. carriers that have agreed to the demanded rate increases from the risk of retaliation, and the facts indicate that they are taking this action in a collective and uniform manner.<sup>80</sup> The number of carriers present in the Philippine market does not preclude the possibility of anticompetitive harm." The Bureau has been encouraged that rates on the U.S.-Philippines

<sup>76</sup> See *Benchmarks Order*, 17 FCC Rcd 19, 806 at 19,862-63, para. 115.

<sup>77</sup> See *India*, DA 98-1060; *Argentina Order*, 11 FCC Rcd 18,014. Order on Review, 14 FCC Rcd 8306 (1999); *Peru Order*, 14 FCC Rcd 8318. See also *Aeronautical Radio v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), cert denied, 451 U.S. 920 (1981).

<sup>78</sup> See *Ex Parte* Email from Patricia Paoletta, counsel for Globe, to the International Bureau, FCC (February 26, 2003) containing Letter from the Republic of the Philippines, National Telecommunications Commission to the Commissioners, FCC (February 26, 2003).

<sup>79</sup> See, e.g., *AT&T Petition* Attachment A to Declaration of Mark Miller; *WorldCom Petition*, Attachment 1-3; *PLDT Opposition*, Exhibit 1-8. See *supra* note 9.

<sup>80</sup> For example, Globe's filing with the U.S. Securities and Exchange Commission further demonstrates an express contract and unity of purpose on the part of Globe, PLDT, Smart, and other Philippine carriers to raise termination rates for international services. See Globe Telecom, Inc., SEC Form 6-K filing, (January 29, 2003) at 18. However, we note that the Commission's authority extends to the Commission policies and authority granted by Congress. The Commission is not empowered to make findings or bring actions under the Sherman Antitrust Act, 26 Stat. 209 (1890), codified as amended, 15 U.S.C. §§ 1-7. We also take note that AT&T's and WorldCom's petitions provide evidence that U.S. carriers that accepted the rate increase may have also received the benefit of volume discounts unavailable to AT&T and WorldCom. See *AT&T Petition* at 8, Attachment B to Declaration of Mark Miller; *WorldCom Petition* at 7. Such a benefit would present a potential violation of the "No Special Concessions" rule in Section 63.14 of the Commission's rules. See 47 C.F.R. § 63.14. In light of the finding of "whipsawing" on the U.S.-Philippines route and the remedy uniformly applicable to all U.S. carriers, we do not, at this time, make a specific finding as to whether any specific U.S. carriers have violated this provision by agreeing to a special concession.

<sup>81</sup> We reject the assertions that because there are multiple carriers that there is no abuse of market power. The six carriers engaged in demanding uniform price increases and retaliation and subject to the AT&T petition, possess significant control over termination facilities in the Philippines. Moreover, PLDT, alone as the dominant carrier, possesses substantial control over both the wireline and wireless markets in the Philippines, regardless of the market share of the other carriers also engaged in these actions. See *supra* paras. 2, 11.

route have moved downward over a number of years; however, the potential for anticompetitive behavior is always present and backsliding from achieving more competitive LIS.-international markets and cost-based rates can occur." As a result of the abuse of market power by the Philippine carriers, AT&T suffers an unfair competitive disadvantage in the U.S.-Philippines market vis-a-vis U.S. carriers that are not currently suffering retaliation.<sup>83</sup> The Philippine carriers' actions now put U.S. consumers at risk of incurring higher calling prices and experiencing poor service quality on the U.S.-Philippines route.<sup>84</sup> These actions effectively distort any competitive market forces on the U.S.-Philippines route and deprive consumers of the benefit of the more market-based termination rates previously negotiated by U.S. carriers. The Commission's ISP is designed to prevent this discriminatory harm, and we now act to enforce it.<sup>85</sup>

## B. Suspension of Payments

18. In light of the our finding above that the Philippine carriers are engaging in "whipsawing," we find that Bureau action on the U.S.-Philippines route is necessary in order to protect the public interest.<sup>86</sup> The disruption of services is harmful to U.S. consumers because it results in

<sup>82</sup> We note that in 1997, the Bureau found that PLDT had engaged in discriminatory conduct in violation of the ISP against U.S. carriers on the U.S.-Philippines route. *In the Matter of AT&T Corp., MCI Telecommunications Corp., Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service with Various Countries*, Memorandum Opinion, Order and Authorization, DA 97-1952 (rel. Sept. 10, 1997).

<sup>83</sup> The selective retaliation against U.S. carriers may result in the immediate loss of large business customers or other customers sensitive to price and quality changes, as ~~there~~ customers migrate to other U.S. carriers with active networks. This discriminatory harm is further exacerbated by the fact that some U.S. carriers, such as AT&T, have apparently suffered more widespread loss of circuits than other U.S. carriers, such as WorldCom, despite their similar refusals to agree to the demanded increases. *See AT&T Petition* at 15; *WorldCom Petition* at 4-5.

<sup>84</sup> Information from resale "spot market" operator, Arbinet thexchange, demonstrates that the available "spot market," or refile rate, to terminate U.S. traffic in the Philippines rose during the time period from January 10, 2001 to February 5, 2003, after circuits were lost on February 1, 2003. Specifically, the average rate for terminating a minute of traffic in the Philippines was listed as approximately 8.4 cents on average on January 10, 2003. The bid price for service at the 42% ASR or answer seizure ratio, or measure of call completion quality, to terminate in the Philippines rose to approximately 12.7 cents on February 5, 2003. *See Submission from Chi K. Eng, General Counsel, Arbinet thexchange, to the Secretary, FCC* (filed February 21, 2003). We note that PLDT has submitted information about "spot market" rates available on February 26, 2003 for fixed line termination in the Philippines that range from approximately 10.7 cents to 19 cents per minute. This still represents a significant increase from the previously available 8.4 cent rate available on January 10, 2003. *Ex parte Letter from PLDT* (filed February 27, 2003). *Ex parte letter from ATRT to Donald Abelson, Chief, International Bureau* (filed March 3, 2003).

<sup>85</sup> *See In the Matter of AT&T Corp., Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina re Application for Review*, Order on Review, 14 FCC Rcd 8306 (1999) at 8311-12, paras. 12-13. *See also* 47 C.F.R. § 0.111, note to para. (a)(1).

<sup>86</sup> *See Argentina Order*, 11 FCC Rcd 18,014, Order on Review, 14 FCC Rcd 8306 (1999); *Peru Order*, 14 FCC Rcd 8318. *See also Aeronautical Radio v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert denied*, 451 U.S. 920



interior quality of service and, eventually, inflated calling prices as a result of greater costs U.S. carriers incur either by paying the demanded increased rates or by refiling their blocked traffic at higher rates.<sup>87</sup> This action is also necessary because an ISR-approved route cannot afford the benefits to consumers of more cost-based rates if, as is the case here, foreign carriers act to distort otherwise market-based negotiations for termination rates. We take prompt action because the Philippine carriers have chosen to disrupt services rather than to continue negotiations with AT&T. Therefore, we order all U.S. carriers providing direct facilities-based service on the U.S.-Philippines route to suspend all payments for termination services to PLDT, Globe, BayanTel, Digitel, Smart, and Subic Telecom, effective immediately. "This suspension of payments will remain in effect until all affected circuits of U.S. carriers are no longer blocked, and service is fully restored."<sup>88</sup> We require AT&T to notify the Bureau immediately when service is fully restored. The Bureau will issue a public notice upon resolution of the situation that will lift the suspension that we now impose.

### C. Removal from ISR-Approved List

19. As we explained above, the purpose of ISR is to promote more cost-based rates to the benefit of U.S. consumers and competition. Anticompetitive behavior such as "whipsawing," in violation of the ISP, undermines this purpose. Therefore, as we determine that "whipsawing" has occurred on the U.S.-Philippines route, we remove the Philippines from the Bureau's list of U.S.-international routes approved for the provision of ISR.<sup>89</sup> We will reinstate the Philippines to the list sixty days after the last ISP-compliant accounting rate agreement between U.S. and the Philippine carriers has been granted, barring any further evidence of anticompetitive behavior." The Bureau will issue a public notice announcing such action. Once the Bureau lifts the suspension of payments on the U.S.-Philippines route, U.S. carriers shall make payments for traffic settled only pursuant to the ISP for the time period effective from February 1, 2003, when the Philippine carriers began engaging in the "whipsawing" of U.S. carriers, until the date the Bureau returns the Philippines to the ISR-approved list.<sup>91</sup>

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(1981); *Cable & Wireless P.L.C.*, 166 F.3d 1224 (D.C. Cir. 1999)

<sup>87</sup> See *supra* note 84

<sup>88</sup> Upon resumption of payments, we expect U.S. carriers to comply with their legal contractual obligations respecting services rendered prior to February 1, 2001. See *Globe Opposition* 7-8.

<sup>89</sup> See 47 C.F.R. § 63.16. The Commission's list is available from the International Bureau's World Wide Web site at <http://www.fcc.gov/ib>.

<sup>90</sup> Pursuant to Section 64.1001(g) of the Commission's rules, accounting rate modifications are subject to a 21-day pleading cycle. Modifications are deemed granted on the 22<sup>nd</sup> day without any formal staff action provided that there have been no objections and the Bureau has not acted to suspend the modification. 47 C.F.R. § 64.1001(g).

<sup>91</sup> See *Peru Order*, 14 FCC Rcd 8318. See also *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544 (D.C. Cir. 1993)

#### D. Enforcement of ISP Requirements

20. The restrictions of the ISP, as explained above, are designed to address the “whipsawing” of U.S. carriers occurring on the U.S.-Philippines route. We, therefore, enforce the restrictions of the ISP on all U.S. facilities-based carriers serving the U.S.-Philippines route in order to ensure nondiscrimination among U.S. carriers and the filing of accounting rates at the Commission to monitor compliance with the ISP.<sup>92</sup> U.S. carriers must now comply with the specific requirements of the ISP to divide the accounting rate evenly with Philippine carriers, to negotiate proportionate return of traffic, and to ensure nondiscrimination among U.S. carriers, in addition to the general requirements of complying with the “No Special Concessions” rule and the Commission’s public accounting rate modification and contract filing requirements. Accordingly, all U.S. facilities-based carriers authorized to provide service to the Philippines must negotiate new agreements for the termination of services in strict compliance with the ISP. Such agreements must be effective from February 1, 2003. We enforce the ISP from the date on which Philippine carriers began retaliation against select U.S. carriers – February 1, 2003. We do so in order to address the discriminatory or exclusive nature of rates and terms offered by Philippine carriers to U.S. carriers and to provide for transparency among U.S. carriers. The enforcement of the ISP will assist the Bureau in monitoring the potential of “price squeeze” behavior.<sup>93</sup> In addition, we note that requiring payments under the ISP to apply from February 1, 2003 will permit payment for any services rendered during the period of suspension once the suspension is lifted. Upon the filing of a symmetrical settlement rate in compliance with the ISP, we will evaluate the reasonableness of the rate modification to ensure that U.S. consumers are not adversely affected. If we find that anticompetitive behavior continues despite our enforcement of the ISP’s requirements, we will consider taking further action.

21. Moreover, as we find that carriers other than PLDT have engaged in “whipsawing” behavior, we impose the requirements of the ISP on U.S. carriers in their negotiations with Globe, BayanTel, Digitel, Smart, and Subic Telecom.” As explained above, these carriers in conjunction with

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<sup>92</sup> We note that ISR rates are not required to be publicly filed with the Commission. Contracts with dominant foreign carriers, such as operating agreements, subject to Section 43.51 of the Commission’s rules are required to be filed regardless of whether a route is approved for ISR. See 47 C.F.R. § 43.51.

<sup>93</sup> In their petitions, both AT&T and WorldCom raise concerns about potential price squeeze behavior on the part of PLDT’s U.S. affiliate and request that the Commission consider taking action against PLDT U.S. Ltd. *AT&T Petition* at 15-16; *WorldCom Petition* at 6-7. “Price squeezes” involve the ability of foreign carriers with market power to distort U.S. competition when such foreign carriers and their U.S. affiliates act together as an integrated firm, both as a competitor in the U.S. market and monopoly supplier of termination services in the foreign market. This affiliation enables the foreign carrier’s U.S. affiliate to underprice other U.S. competitors on the route, as the payment for termination services represents an internal corporate transfer for the affiliate, but represents a real cost to unaffiliated U.S. competitors. The Commission’s ISP and Section 214 dominant carrier safeguards are intended to keep such relationships between foreign carriers and their affiliated U.S. carriers at arm’s-length. We note that several Philippine carriers have U.S. affiliates or authorizations to provide U.S.-international services, including PLDT, BayanTel, Globe, and Digitel.

<sup>94</sup> The enforcement of the ISP will not apply to U.S. carrier agreements with any Philippine carriers not subject to this Order.

PLDT possess control over a substantial majority of the termination services in the Philippines.<sup>95</sup> Their actions have resulted in harm to the public interest. As a result, U.S. carriers must comply with all of the requirements of the ISP, including the "No Special Concessions" rule and filing requirements, with respect to correspondent agreements with each of the Philippine carriers.

**E. Monitoring**

22. Additionally, we require that AT&T submit a status report to the Bureau within fifteen days of the release of this Order." Should this situation remain unresolved and present continuing harm to the public interest, we will consider further action.

**F. Conclusinn**

23. We find in this Order that Philippine carriers have engaged in the "whipsawing" of AT&T and WorldCom to the harm of U.S. consumers. Therefore, we order all U.S. carriers providing facilities-based services to suspend payments for termination services to the Philippine carriers pending restoration of circuits on the U.S.-Philippine route. Moreover, we find it necessary to remove the Philippines from the Commission's list of U.S.-international routes approved for the provision of ISR. We now enforce the restrictions of the ISP on the U.S.-Philippines route in order to address anticompetitive behavior through the requirement of nondiscrimination among U.S. carriers and to permit the monitoring of U.S. carrier compliance with the ISP through the public filings of accounting rates. In light of the Bureau's final actions in this order, we deem AT&T's request for interim relief moot.

**IV. ORDERING CLAUSES**

24. Accordingly, IT IS ORDERED that AT&T's Emergency Petition for a Settlements Stop Payment Order and WorldCom's Petition for Protection from "Whipsawing" on the U.S.-Philippines Route are HEREBY GRANTED;

25. IT IS FURTHER ORDERED that the Opposition of Globe Telecom and the Philippine Long Distance Telephone Company's Consolidated Opposition to AT&T and WorldCom Petitions are HEREBY DENIED:

<sup>95</sup> See *supra* para. 2

<sup>96</sup> We request that any other authorized U.S. carriers that may have experienced circuit loss on the U.S.-Philippines route also submit such reports.

26. IT IS FURTHER ORDERED that all facilities-based carriers subject to FCC jurisdiction having a correspondent agreement with the Philippines Long Distance Telephone Company, Globe Telecom, Inc., Bayan Telecommunications Company, Digitel Telecommunications Philippines, Inc., Smart Communications, Inc., and Subic Telecom for direct termination of U.S. traffic on the U.S.-Philippines route SHALL SUSPEND all termination payments to the Philippines Long Distance Telephone Company, Globe Telecom, Inc., Bayan Telecommunications Company, Digitel Telecommunications Philippines, Inc., Smart Communications, Inc., and Subic Telecom for switched voice service effective upon release of this Order until such time as the Commission issues a Public Notice that AT&T's circuits on the U.S.-Philippines route are fully restored;

27. IT IS FURTHER ORDERED that, upon full restoration of circuits, U.S. carriers shall only make payments that comply with the requirements of the Commission's International Settlements Policy, effective for traffic terminated on the U.S.-Philippines route from February 1, 2003 in accordance with the conclusions contained in paragraphs 18 through 21 of this Order;

28. IT IS FURTHER ORDERED that, the Philippines shall be removed from the Commission's list of U.S.-international routes approved for the provision of International Simple Resale.<sup>97</sup>

29. IT IS FURTHER ORDERED that, the International Settlements Policy shall apply to U.S. carriers in their agreements with Globe Telecom, Inc., Bayan Telecommunications Company, Digitel Telecommunications Philippines, Inc., Smart Communications, Inc., and Subic Telecom;

30. IT IS FURTHER ORDERED that, sixty days from the grant of the last U.S. carrier accounting rate modification submitted pursuant to Section 64.1001 of the Commission's rules, 47 C.F.R. 64.1001, in compliance with the International Settlements Policy, the Commission shall return the Philippines to the list of U.S.-international routes approved for the provision of International Simple Resale, barring evidence of further anticompetitive behavior, and from which effective date U.S. carriers may settle traffic pursuant to International Simple Resale arrangements:

31. IT IS FURTHER ORDERED that, AT&T and WorldCom shall immediately inform the Commission when their circuits have been fully restored, and, otherwise, they shall file a report within 15 days of release of this Order explaining the status of their attempts to have their circuits on the U.S.-Philippines route fully restored:

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<sup>97</sup> The Commission's list of U.S.-international routes approved for the provision of International Simple Resale is available on the Commission's website at "ISR-Approved Countries," [www.fcc.gov/ib](http://www.fcc.gov/ib).

32. IT IS FURTHER ORDERED that AT&T's request for interim relief is hereby MOO?':

33. This Order is issued pursuant to Sections 1, 2, 4(i)-(j), 201-205, 211, 214, 303(r), and 309 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i)-154(j), 201-205, 211, 214, 303(r), 309, and Sections 0.51, 0.261, 43.51, 63.14, 63.16, 64.1001 of the Commission's Rules, 47 C.F.R. §§ 0.51 and 0.261, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION



Donald Abelson  
Chief  
International Bureau